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No. 85-445 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1985

PETER DEFAZIO, et al,
Petitioners,

v.

THE CITY OF SPRINGFIELD,
by and through
THE SPRINGFIELD UTILITY BOARD, et al,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners assert that this case involves issues of jurisdiction and trial court discretion. The underlying issue, however, is whether the trial court properly addressed and decided a question of contract interpretation, namely, who has the risk of loss under certain agreements.

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REASONS FOR DENYING THE WRIT [1]

The Ninth Circuit ruled on a question of contract interpretation relating to certain agreements involving utilities in the Northwest. In the early 1970s, the Washington Public Power Supply System ("Supply System"), the Bonneville Power Administration ("BPA"), and more than 100 municipalities and public utility districts in Oregon, Washington, Wyoming, Idaho, Montana, and Nevada ("participants") entered into three-party agreements ("net billing agreements") in connection with the construction of three nuclear power plants to be built by Supply System in Washington. A fourth plant, built in Oregon by Portland General Electric Co., an investor-owned utility, also involved a form of net billing agreement. That plant, as well as one of the Supply System plants, has been completed; both are furnishing power to Northwest utilities.

The ultimate issue in this litigation was the authority of the participants to enter into the net billing agreements. The major question underlying that issue was whether the participants or the BPA had assumed the "dry-hole" risk as to the plants. In other words, who has to pay if the plants are never completed or never produce power?

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[1] Respondents, A Group of Washington Utilities, are identified in prior proceedings. None of these entities has any parent company, subsidiary, or affiliate.

The trial court held that the "dry-hole" risk rested with the BPA. The Ninth Circuit affirmed.

The decision of the Ninth Circuit is not in conflict with any decision of any other Court of Appeals or with any decision of a state court of last resort. Nor did the Ninth Circuit rule on any important and unsettled issue of federal law. Rather, on the basis of the specific facts before it, the Ninth Circuit interpreted a particular set of agreements. Because of the unique nature of the net billing agreements, the facts involved here are unlikely to arise again. The decision of the circuit court does not merit Supreme Court review.

This Court has twice declined to review the rulings of state supreme courts regarding agreements between the Supply System and participants. *Chemical Bank* v. *Wash. Pub. Power Supply*, 102 Wash 2d 874, 691 P2d 524 (1984), cert denied sub nom *Chemical Bank* v. *Public Utility District No. 1*, — US —, 85 L Ed 2d 510, 105 S Ct 2154 (1985); *Asson* v. *City of Burley*, 670 P2d 839 (Idaho 1983), cert denied sub nom *Chemical Bank* v. *Asson*, — US —, 83 L Ed 2d 149, 105 S Ct 219 (1984). Those agreements concerned two additional nuclear power plants which were to be built by the Supply System in Washington. The Court likewise should leave in place the lower court ruling in this instance. To do otherwise would be to cast into doubt the legality of the net billing agreements and play havoc with power planning in the entire Northwest region.

The petition for a writ of certiorari should be denied.

Respectfully submitted

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